Supreme Court, U.S.
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No. 98-818

IN THE
Supreme Court of the United States

HAROLD F. RICE,
Petitioner,

v.

BENJAMIN J. CAYETANO, GOVERNOR OF THE STATE OF HAWAII,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the Court of Appeals correctly held that allowing only the beneficiaries of trust obligations to select the trustees bound to meet those obligations does not violate the Fourteenth or Fifteenth Amendment, when the validity of the underlying trust obligations is unchallenged and the obligations are based on the congressionally recognized status of the beneficiaries as an indigenous people, who—like American Indians and Alaska Natives—were once sovereign, have unique ties to aboriginal lands taken by the Federal Government, and occupy a long-standing special trust relationship with the United States?

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BRIEF FOR RESPONDENT

INTRODUCTION

Because petitioner and his amici have taken such liberties with it, we begin by restating the only classification challenged in this case: Hawaii limits eligibility to select trustees of the trusts established for the benefit of the indigenous people of Hawaii to the sole beneficiaries of those trusts—"Hawaiians." Haw. Rev. Stat. § 13D-3(b)(1). The term "Hawaiian" is not defined in "blatant," "flagrant," or "explicit" racial terms, as petitioner's mantra has it. Br. 1, 13, 32. It means "any descendant of the aboriginal people inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii." Haw. Rev. Stat. § 10-2. "Blood"—which practically seeps from petitioner's brief—is not found anywhere in this definition. Nor is "race." The definition instead is perfectly drawn to capture the intended class: indigenous Hawaiians, the once-sovereign people who—as Congress has repeatedly recognized—enjoy unique ties to aboriginal lands and a special trust relationship with the United States.[1]

[1] We use "indigenous Hawaiian" interchangeably with "Hawaiian." We use "Native Hawaiian" to refer to the definition estab-

From our Nation's founding, Congress and this Court have recognized a special obligation to America's first inhabitants and their descendants—over whose aboriginal homelands we have extended our national domain—and have recognized that Congress is empowered to honor that obligation as it sees fit. Centuries of Indian jurisprudence rest on this understanding in the case of the indigenous people of the lower 48 States—American Indians. Congress has recognized that this obligation extends as well to Alaska Natives, even though they are historically and culturally distinct from American Indians, and until recently were not formally recognized as "Indian tribes." And Congress has recognized this obligation in the case of indigenous Hawaiians, who—like Alaska Natives—are historically and anthropologically distinct from American Indians. Indeed, Congress has expressly "affirm[ed] the trust relationship between the United States and Native Hawaiians"—the "indigenous people with a historical continuity to the original inhabitants of [Hawaii] whose society was organized as a Nation prior to * * * 1778." 42 U.S.C. § 11701(1), (13).

Contrary to petitioner's suggestion, this case does not present an opportunity to end racial strife in this country. Nor does it fit in line with the Court's precedents confronting discrimination against African-Americans, or efforts to redress that discrimination. Rather, in its broadest terms, the case presents the question whether Congress and the State of Hawaii—acting pursuant to and consistent with the federal trust responsibility Congress required the State to accept before admitting it to the Union—may honor the special obligation to indigenous Hawaiians, in the same fashion Congress and many States

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lished by the Hawaiian Homes Commission Act ("HHCA"), § 201(a)(7), 42 Stat. 108 (1921), and incorporated in Haw. Rev. Stat. § 10-2. As we explain below, since the 1970s Congress has repeatedly used "Native Hawaiian" to refer to all indigenous Hawaiians without regard to blood quantum. *See* note 4, *infra*.

have for centuries attempted to do with respect to America's other indigenous people. The real discrimination that is afoot here is the notion that indigenous Hawaiians may—indeed, according to petitioner, *must*—be treated differently from all other indigenous people.

There is no basis in either the Fifteenth or Fourteenth Amendment to establish such an unequal regime, and to compound the legitimate, congressionally recognized grievances of Hawaiians by according them second-class status among the Nation's indigenous people. And this case, in any event, provides a singularly ill-suited vehicle for doing so. Petitioner has not challenged the validity of the trusts established for the benefit of indigenous Hawaiians, or the Office of Hawaiian Affairs ("OHA") that administers those trusts. Rather, petitioner's only complaint—as both the District Court and Court of Appeals took pains to emphasize—lies with the decision to limit selection of trustees of the unchallenged trusts to the only people with a beneficial interest in them—indigenous Hawaiians. Because that limitation is not based on race, the judgment below should be affirmed.

STATEMENT OF THE CASE

1. The Nation's fiftieth State is its most remote, a chain of islands dotting the Pacific Ocean more than 2000 miles from the American mainland. The history of the indigenous people of Hawaii is in many respects as unique as the Islands themselves. But generally speaking, the story of indigenous Hawaiians fits the same basic pattern of events that mark the history of America's other aboriginal people. Westerners "discovered" the land centuries after humans first arrived there and organized a society; the newcomers asserted or acquired title to the land and displaced the original inhabitants from their homelands; and there eventually came an acknowledgment on the part of the new sovereign—the United States—that with the exercise of dominion over a land that

others had once known as theirs came a special obligation to and relationship with those once-sovereign, indigenous people.

a. It is believed that Hawaii's first inhabitants migrated there from other islands in the South Pacific, or perhaps even from the Americas, more than a millennium ago.[2] They "lived in a highly organized, self-sufficient, subsistent social system based on communal land tenure with a sophisticated language, culture, and religion," and were "organized as a Nation." 42 U.S.C. § 11701(1), (4); *accord* 20 U.S.C. § 7902(1). *See* J.A. 58-59. The first recorded foreign contact with this society occurred in 1778, when Captain James Cook happened upon the Islands on the morning of January 18, dropped anchor off the village of Waimea on Kauai, and was met by Islanders whom he and his crew called "Indians." Nearly 5000 miles away, America was fighting for its independence. *See* 1 Kuykendall, *supra*, at 3-28.

Like the second-comers to the American mainland, Cook and his followers wrought radical changes in the aboriginal society. From 1795 to 1810, Kamehameha I—aided by Western arms and allies—brought the Islands under his control and established the Kingdom of Hawaii. Over the following decades, the communal land tenure system was dismantled, and the Islands' four million acres of land divvied up. The King set aside 1.5 million acres for the Island chiefs and people, known as "Government lands," and kept a million acres for himself and his heirs, known as "Crown lands." The remaining 1.5 million acres were conveyed separately to the Island chiefs. Foreigners not only acquired large tracts of now "private" land, but gained great economic and political influence; meanwhile,

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2 Most believe that the first Hawaiians came from the Society Islands (Tahiti), 2700 miles to the south. *See* 1 Ralph S. Kuykendall, *The Hawaiian Kingdom* 3 (1968). Some, however, have hypothesized that they were American Indians from the Pacific Northwest, nearly 2700 miles to the northeast. *See* Thor Heyerdahl, *American Indians in the Pacific* 161-168 (1952).

the population and general condition of indigenous Hawaiians declined rapidly. *See* Neil M. Levy, *Native Hawaiian Land Rights*, 63 Cal. L. Rev. 848, 848-861 (1975); Lawrence H. Fuchs, *Hawaii Pono: A Social History* 251 (1961); J.A. 59-60. The United States recognized the Kingdom as a sovereign and independent country, and entered into treaties with it. *See* Apology Bill, Pub. L. No. 103-150, 107 Stat. 1510, 1510 (1993), reproduced at J.A. 11-18.

In 1893 the Kingdom was overthrown by American merchants. In furtherance of this *coup d'état*, the United States Minister to Hawaii, John L. Stevens, caused United States Marines to land in Honolulu and position themselves near Iolani Palace. This had the desired effect and, on January 17, 1893, Queen Liliuokalani relinquished her authority—under protest—to the United States. The revolutionaries formed the Republic of Hawaii and sought annexation to the United States. But, in Washington, President Cleveland refused to recognize the new Republic, and denounced—as did Congress a century later—the role of United States agents in overthrowing the monarchy, which the President likened to an "'act of war, committed * * * without authority of Congress,'" and called a "'substantial wrong.'" 107 Stat. at 1511 (quoting address). *See* 42 U.S.C. § 11701(7)-(9).

The Republic expropriated the Government and Crown lands, without compensating the Queen or anyone else. *See Levy*, 63 Cal. L. Rev. at 863. On July 7, 1898, the Republic realized its goal of annexation under the Newlands Joint Resolution. As part of the annexation, the Republic "ceded 1,800,000 acres of crown, government and public lands of the Kingdom of Hawaii, without the consent of or compensation to the Native Hawaiian people of Hawaii or their sovereign," to the United States. 107 Stat. at 1512. As Congress has recognized, "the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or

over their national lands to the United States." *Id.* Indeed, they were given no say in the matter.

The Territory of Hawaii was established in 1900. The Organic Act reaffirmed the cession of Government and Crown lands to the United States, and put the lands "in the possession, use, and control of the government of the Territory of Hawaii * * * until otherwise provided for by Congress." Organic Act, § 91, 31 Stat. 141, 159 (1900). It did not address—let alone attempt to resolve—the land claims of indigenous Hawaiians. Hawaii remained a Territory until 1959, when it entered the Union.

b. By the time the stars and stripes was raised over Hawaii in 1898, the era of treaty-making with the indigenous people of the American continent had come to an end. As a result—as is true with respect to Alaska Natives—the United States never entered into treaties with indigenous Hawaiians as such. Similarly, Congress never formally recognized or dealt with Hawaiians as "Indian tribes," or attempted to sequester them on reservations. Instead, Congress subjected Natives to the same territorial laws as non-Natives. *See Metlakatla Indian Community* v. *Egan*, 369 U.S. 45, 51 (1962); Pet. App. 32a-33a. Yet—as is true with respect to Alaska Natives—Congress has recognized that it has a special relationship with indigenous Hawaiians, and has sought to enable them to benefit in some measure from their homelands.

In 1921 Congress passed the Hawaiian Homes Commission Act ("HHCA"), 42 Stat. 108 (1921). The HHCA placed about 200,000 acres of the lands ceded to the United States in 1898 by the Republic under the jurisdiction of the Hawaiian Homes Commission—an arm of the Territorial Government—to provide residential and agricultural lots for Native Hawaiians. HHCA § 203. "Native Hawaiian" was defined to include "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." *Id.* § 201(a)(7). Congress found support for the HHCA "in previous enactments granting Indians * * * special privileges in obtaining and using the public lands," H. R. Rep. No. 839, 66th Cong., 2d Sess. 11 (1920), and has since found that the HHCA "affirm[ed] the trust relationship between the United States and the Native Hawaiians." 42 U.S.C. § 11701(13); *accord* 20 U.S.C. § 7902(8).[3]

Congress took a more elaborate approach in the Statehood Act. First, it conveyed to the State the 200,000 acres of Hawaiian Home Lands set aside for the benefit of Native Hawaiians under the HHCA and—"[a]s a compact with the United States relating to the management and disposition of [those] lands"—required the State to adopt the HHCA as part of its *own* constitution. Statehood Act, Pub. L. No. 86-3, § 4, 73 Stat. 4, 5 (1959). Second, it conveyed to the State the bulk of the other lands ceded to the United States in 1898 by the Republic, but required the State to hold these lands "as a public trust" for, *inter alia*, "the betterment of the conditions of native Hawaiians, as defined in the [HHCA], * * * in such a manner as the constitution and laws of * * * [Hawaii] may provide." *Id.* § 5(b), (f). Congress left with the Federal Government the ultimate authority to enforce this trust by authorizing the United States to bring suit against the State for any "breach of [the] trust." *Id.* § 5(f).

Congress did not stop there. "In recognition of the special relationship which exists between the United States and the Native Hawaiian people, [it] has extended to Native Hawaiians the same rights and privileges accorded to American Indian, Alaska Native, Eskimo, and Aleut

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[3] Testifying in support of the HHCA, Secretary of the Interior Franklin D. Lane analogized Native Hawaiians to American Indians. *See Hearings Before the House Comm. on the Territories on the Rehabilitation and Colonization of Hawaiians and Other Proposed Amendments to the Organic Act of the Territory of Hawaii*, 66th Cong. 129-130 (1920) (basis for special preference to Native Hawaiians is "an extension of the same idea" relied upon to grant such preferences to American Indians); H.R. Rep. No. 839, *supra*, at 4 ("the natives of the islands * * * are our wards * * * for whom in a sense we are trustees").

communities." 20 U.S.C. § 7902(13). Thus, Congress has expressly included "Native Hawaiians"—which it has repeatedly defined since the 1970s to mean *any* descendant of the Islands' inhabitants prior to 1778, without regard to blood quantum[4]—in scores of statutory programs benefiting indigenous people across the Nation. *See* 42 U.S.C. § 11701(19)-(20) (listing statutes); 20 U.S.C. § 7902(13)-(16) (same); Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 Yale L. & Pol. Rev. 95, 106 n.67 (1998).

In 1993 Congress passed a Joint Resolution signed into law "apologiz[ing] to Native Hawaiians" for the United States' role in the *coup*, and "the deprivation of the rights of Native Hawaiians to self-determination." 107 Stat. at 1513. The law specifically acknowledged that "the health and well-being of the Native Hawaiian people is intrinsically tied to * * * the land," that land was taken from Hawaiians without their consent or compensation, and that indigenous Hawaiians have "never directly relinquished their claims * * * over their national lands." *Id.* In other recent acts, Congress has expressly affirmed the "special"—and "trust"—relationship between the United States and Hawaiians, and has specifically recognized Hawaiians as "a distinct and unique indigenous people." 42 U.S.C. § 11701(1), (13), (15), (16), (18); *accord* 20 U.S.C. § 7902(1), (10).

c. In light of Hawaii's unique historical and geographic circumstances, it is perhaps not surprising that Congress chose to delegate to the State authority to manage the

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4 *See, e.g.*, 16 U.S.C. § 470w(17) (" 'Native Hawaiian' means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in * * * Hawaii"); 20 U.S.C. § 80q-14(11) (same); 20 U.S.C. § 4402(6) (same); 20 U.S.C. § 7118(b) (same); 20 U.S.C. § 7912(1) (same); 25 U.S.C. § 3001(10) (same); 29 U.S.C. § 1503(11) (same); 42 U.S.C. § 254s(c) (same); 42 U.S.C. § 2992c(3) (same); 42 U.S.C. § 3057k (same); Apology Bill, 107 Stat. at 1513 (same).

public trust for Native Hawaiians. The pulls of federalism are particularly strong in the case of the most isolated land mass in the world, some 5000 miles from our national Capital. No other State has been given such responsibility with respect to an indigenous people. The people of Hawaii were required to accept this responsibility as a condition of statehood, and did so. *See Ahuna* v. *Department of Hawaiian Home Lands*, 640 P.2d 1161, 1168 (Haw. 1982); 20 U.S.C. § 7902(10); 42 U.S.C. § 11701(16).

In 1978 Hawaii—reaffirming the "solemn trust obligation and responsibility to native Hawaiians"—amended its constitution to establish OHA, to better "address the needs of the aboriginal class of people of Hawaii." Haw. Rev. Stat. § 10-1(a). OHA was empowered to receive a share of the revenues generated by the lands conveyed to the State pursuant to § 5(f) of the Statehood Act, manage those and certain other assets on behalf of indigenous Hawaiians, and, more generally, promote Hawaiian affairs. *See* Haw. Const. art. XII, §§ 4-6; J.A. 35 (Comm. Rep. No. 59). OHA also receives federal funds and helps to administer federal programs for indigenous Hawaiians. *See* 42 U.S.C. § 2991b-1.

OHA's overriding purpose is the "betterment of conditions of native Hawaiians" and "Hawaiians." Haw. Rev. Stat. § 10-3(1)-(2). "Native Hawaiian" means "any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the [HHCA]." *Id.* § 10-2. "Hawaiian" includes "any descendant of the aboriginal people inhabiting the Hawaiian Islands * * * in 1778." *Id.* The latter definition was added to bring state law "in line with the current policy of the federal government to extend benefits for Hawaiians to *all* Hawaiians *regardless of blood quantum*." J.A. 46 (Comm. Rep. No. 59) (emphases added). *See* note 4, *supra*.

OHA administers two separate trust funds. The principal fund consists of 20% of revenues generated from § 5(f) lands. It is administered for the benefit of Native Hawaiians. The other fund consists of appropriations from Congress and the State. It is administered for the benefit of Hawaiians (including Native Hawaiians). *See* Haw. Rev. Stat. §§ 10-2, 10-3(1), 10-13.5; Pet. App. 6a.

OHA is a "body corporate," "separate" and "independent of the [state] executive branch." Haw. Rev. Stat. § 10-4. It was modeled on a public university "to give it maximum independence." J.A. 52 (Comm. Rep. No. 13); *see id.* 61, 65 (debates). It does not have the authority to tax and does not administer programs for non-beneficiaries. It may sue and be sued by the State of Hawaii—and *has* sued and been sued by the State. OHA employees are not part of the state civil service system. Haw. Rev. Stat. § 10-12. In short, "[t]he status of [OHA] is"—as it was intended to be—"unique and special." J.A. 41 (Comm. Rep. No. 59). *See* Pet. App. 42a-43a.

OHA is governed by a board of trustees elected by Hawaiians. Haw. Const. art. XII, § 5. *See* Haw. Rev. Stat. § 13D-3(b). In establishing this scheme, the Constitutional Convention Committee "concluded that a board of trustees chosen from among those who are interested parties would be the best way to insure proper management and adherence to the needed fiduciary principles." J.A. 39 (Comm. Rep. No. 59). This approach would "enhance representative governance and decision-making accountability and, as a result, strengthen the fiduciary relationship between the board member, as trustee, and the native Hawaiian, as beneficiary." *Id.* 40. *See also id.* ("the board should be elected by all beneficiaries" since "[c]ertainly they would best protect their own rights"). This approach also would promote "self-determination and self-government" of the Hawaiian people. *Id.* 53 (Comm. Rep. No. 13).

Hawaii's efforts to meet its delegated trust responsibility have not gone unnoticed in Washington. Congress has recognized that the "constitution and statutes of the State of Hawaii * * * acknowledge the distinct land rights of the Native Hawaiian people as beneficiaries of the public lands trust," and "reaffirm and protect the unique right of the Native Hawaiian people to practice and perpetuate their cultural and religious customs, beliefs, practices, and language." 42 U.S.C. § 11701(3); *see* 20 U.S.C. § 7902(21). In addition, Congress has appropriated funds for and repeatedly recognized OHA. *See, e.g.*, 16 U.S.C. § 470w(18); 20 U.S.C. § 80q-11(b)(2); *id.* § 4441(c)(2)(B); *id.* § 7904(b)(3); *id.* § 7912(5); 25 U.S.C. § 3001(12); 42 U.S.C. § 2991b-1. Not once has Congress indicated that the State has strayed from its delegated trust responsibility, or improperly expanded its role.

2. Like millions of Americans, petitioner traces his roots to individuals who inhabited what is now American soil before the United States exercised sovereignty over it. Petitioner, however, is no more an indigenous Hawaiian than the descendants of Miles Standish are American Indians. As a result, petitioner is not a subject of the special relationship between the United States and Hawaiians, a beneficiary of the OHA trusts, or within the federal and state law definition of "Hawaiian." In March 1996 he nevertheless applied to vote in the special election for OHA trustees. His application was denied. Pet. App. 7a.

a. Shortly thereafter, petitioner brought this action pursuant to 42 U.S.C. § 1983, challenging "his exclusion from voting for OHA trustees on the grounds that conditioning eligibility on being Hawaiian violates * * * the Fourteenth and Fifteenth Amendments of the United States Constitution." Pet. App. 7a. In May 1997 the District Court granted summary judgment for the State, concluding that the challenged classification "is not based

upon race, but upon the recognition of the unique status of Native Hawaiians" under federal law. *Id.* 35a. *See also id.* 29a-34a, 38a. Relying on this Court's decision in *Morton v. Mancari,* 417 U.S. 535 (1974), the court then held that the statutory scheme would not violate the Fourteenth or Fifteenth Amendments if "it can be tied rationally to the fulfillment of the unique obligation to Native Hawaiians." Pet. App. 35a. That test was met because "[t]he State of Hawaii [has simply] limited the electoral franchise to those who are to benefit from OHA's programs," *id.* 36a—the indigenous people who are the subject of the federal trust obligation.

b. The Court of Appeals affirmed. The court emphasized that the constitutionality of "the trusts and OHA is not challenged." Pet. App. 9a; *see id.* 1a-2a, 9a n.11. Taking the unchallenged trust structure "as given," the court considered "only whether Hawaii may limit those who vote in special trustee elections to those for whose benefit the trust was established." *Id.* 2a, 9a. In answering that question, the court—relying on *Mancari*—refused "to invalidate the voting restriction simply because it appears to be race-based without also considering the unique trust relationship that gave rise to it." *Id.* 14a. As the court explained, "the restriction is rooted in the special trust relationship between Hawaii and descendants of aboriginal people who subsisted in the Islands in 1778 and still live there—which is not challenged in this appeal." *Id.* 17a.

The court ultimately concluded that the classification was based on beneficiary status, not race. "[T]he franchise for choosing trustees in special elections may be limited to Hawaiians because Hawaiians are the only group with a stake in the trust and the funds that OHA trustees administer." *Id.* 2a. Hawaiians "have the right to vote as such"—*i.e.*, as beneficiaries—"not just because they are Hawaiian." *Id.* "For this reason, neither the

Fifteenth Amendment nor Equal Protection Clause precludes Hawaii from restricting the voting for trustees to Hawaiians and excluding all others." *Id.* 2a-3a.[5]

A petition for rehearing and suggestion of rehearing en banc were denied, with no judge voting for rehearing. *Id.* 44a. This Court granted certiorari.

SUMMARY OF ARGUMENT

I. In its broadest terms, this case raises profound issues about Congress' authority to recognize and deal with the Nation's indigenous people. But the Court need not reach those issues if it follows its customary practice and decides the case based on the somewhat unusual procedural posture in which it comes to the Court. As the courts below emphasized, petitioner does not challenge the trusts established for the benefit of indigenous Hawaiians, nor the office that administers those trusts. His sole challenge is to the provision specifying that only beneficiaries of the unchallenged trusts may select the trustees who administer them. That provision, however, does not violate the Fifteenth Amendment—and is not subject to strict scrutiny under the Fourteenth—because it does not draw any distinction "on account of race." U.S. Const. amend. XV, § 1.

The challenged classification is based on the principle that only those with a direct interest in trust assets should decide who will manage them. That is a complete answer to petitioner's charge that the classification is race-based, particularly since petitioner has expressly eschewed any challenge to the underlying trusts themselves, and this Court—in the exercise of judicial restraint—typically pre-

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[5] Both the District Court and the Court of Appeals also concluded that—given OHA's narrow mission and limited powers—limiting the franchise to those disproportionately affected by its activities—Hawaiians—accorded with the "special purpose election" cases. *See* Pet. App. 17a, 37a-43a; *Salyer Land Co.* v. *Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973).

sumes the validity of unchallenged laws. The franchise limitation is not only race-neutral, it also makes perfect sense. Expanding the electorate to non-beneficiaries would create a possible conflict of interest for the trustees, bound by fiduciary duty to safeguard and promote the interests of trust beneficiaries.

II. In any event, petitioner's claim also fails on the open-ended terms in which he presents it to this Court. Classifications based on Congress' decision to assume a special trust relationship with an indigenous people are not based on race, but rather the unique legal and political status that such a relationship entails. Congress has expressly provided that classifications involving indigenous Hawaiians should be treated the same as those involving American Indians, Alaska Natives, and the other indigenous people over whose aboriginal lands the United States has extended its domain. This Court has repeatedly reaffirmed that such judgments are peculiarly within Congress' prerogative to make. Centuries of jurisprudence, not to mention an entire title of the United States Code, are built on the understanding that such classifications are not race-based.

This regime is fully applicable to indigenous Hawaiians. That is true not only because Congress has said so, but because the Framers of the Constitution drew no distinctions among different groups of indigenous people in conferring power to deal with such groups on Congress, and the Framers of the Civil War Amendments never envisioned that those amendments would restrict the ability of Congress to exercise that power. Indeed, while Congress has been given nearly free reign since the founding in the realm of Indian affairs—including in deciding when the United States ought to assume or terminate a trust relationship with an indigenous people—petitioner and his amici would now subject Congress' every move in this realm to the strictest judicial scrutiny. It is no answer that

the law challenged here was passed by a State. Congress was free within the framework of our Federal System to delegate to the State of Hawaii responsibility in administering the federal trust. Congress not only has expressly done so, but has repeatedly ratified Hawaii's efforts to meet that responsibility, including through OHA.

Even if this case were not analyzed like every other case dealing with legislation addressed to a congressionally recognized indigenous people, the challenged classification would still not be race-based. It limits the franchise to those whose ancestors were from a particular place at a particular time, regardless of race. Hawaii was fully justified in restricting the franchise to those whose ancestors were from the Hawaiian Islands in 1778, because that definition captures perfectly the aboriginal people of Hawaii with unique ties to the land. That is the same definition Congress has used in confirming that Hawaiians should be treated the same as all other Native Americans. This Court should defer to that determination, rather than overturn Congress' judgment and relegate Hawaiians to second-class status among the Nation's aboriginal people.

III. Because the challenged classification is not race-based, it does not violate the Fifteenth Amendment. But petitioner's Fifteenth Amendment claim fails for another reason: that Amendment does not apply to special purpose elections for functionaries whose duties disproportionately affect a specific class of voters. That is an apt description of OHA trustees, who lack general governmental powers and are duty bound to act solely in the best interests of the trust beneficiaries, not the general public. The conclusion that the Fifteenth Amendment does not apply to the selection of OHA trustees squares with this Court's decisions holding that the Constitution does not confer upon citizens a right to vote in narrow special purpose elections in which they cannot show a direct interest. This does not mean the States are free to

engage in racial discrimination in connection with such special purpose elections, but rather that such a claim is analyzed under traditional equal protection review.

IV. Regardless of what scrutiny is applied, the challenged classification passes constitutional muster. Limiting the franchise for trustees of the unchallenged trusts to the sole beneficiaries of those trusts—indigenous Hawaiians—readily meets the more deferential review this Court has unfailingly applied to governmental efforts (including state efforts) to meet the federal trust responsibility to an indigenous people. The scheme is a natural effort to promote self-governance by the governed, the same end advanced by the challenged provision in *Mancari*. Indeed, the challenged statute in this case satisfies strict scrutiny. As the Court of Appeals held, the classification is "precisely tailored" to the compelling interest in honoring the federal trust responsibility to indigenous Hawaiians. Pet. App. 17a.

Congress has expressly confirmed a special trust relationship with Hawaiians, extending to them the same rights and privileges as every other indigenous people in this land, and has delegated to the State responsibility to administer this special relationship. The challenged provision in this case is a reasonable and constitutional effort to honor the federal trust. The judgment of the Court of Appeals should be affirmed.

ARGUMENT

I. THE COURT SHOULD DEAL WITH THIS CASE AS IT CAME TO IT AND HOLD THAT THE STATE HAS PERMISSIBLY DEFINED THE FRANCHISE IN TERMS OF BENEFICIARY STATUS.

This Court's customary practice is to "deal with the case as it came here and affirm or reverse based on the ground relied upon below." *Peralta* v. *Heights Med. Ctr., Inc.*, 485 U.S. 80, 86 (1988). *Accord Bragdon* v.

Abbott, 118 S. Ct. 2196, 2205 (1998). Both the Court of Appeals and District Court decided this case on narrow grounds, taking pains to emphasize what indisputably was *not* challenged—"the trusts and OHA." Pet. App. 9a; *see supra* at 12. "[A]ccept[ing] the trusts and their administrative structure as we find them, and assum[ing] that both are lawful, * * * it follows that the state may rationally conclude that Hawaiians, being the group to whom trust obligations run and to whom OHA trustees owe a duty of loyalty, should be the group to decide who the trustees ought to be." Pet. App. 9a-10a (footnote omitted). In other words, taking the unchallenged trusts and OHA "as given," the challenged classification turns on beneficiary status, not race. *Id.* 9a.

Petitioner argues that "[t]he Ninth Circuit's reasoning amounts to an evasion of its constitutional responsibility." Br. 49. But the Court of Appeals merely heeded the basic precept that federal courts should not question the validity of laws—especially state laws—that have not been challenged by the parties and, in a similar vein, should generally accord laws a presumption of constitutionality in reviewing the validity of what *has* been challenged.

Rostker v. *Goldberg*, 453 U.S. 57 (1981), is a good example. There, the Court considered an equal protection challenge to the Military Selective Service Act, which required only males to register for the draft. The underlying statutes and executive policies excluding women from combat were not challenged. Accepting the validity of those statutes and policies, the Court held that "[t]he fact that Congress and the Executive have decided that women should not serve in combat fully justifies Congress in not authorizing their registration, since the purpose of registration is to develop a pool of potential combat troops." *Id.* at 79. As the Court explained, "[t]he Constitution requires that Congress treat similarly situated

persons similarly, not that it engage in gestures of superficial equality." *Id.*[6]

So too here, against the backdrop of the unchallenged trust structure, the State's decision to limit the franchise to beneficiaries makes perfect sense—on entirely race-neutral terms. Limiting the franchise to beneficiaries is "the best way to insure proper management and adherence to the needed fiduciary principles," "enhance representative governance and decision-making accountability and, as a result, strengthen the fiduciary relationship between the board member, as trustee, and the native Hawaiian, as beneficiary." J.A. 39-40 (Comm. Rep. No. 59). Opening the election to non-beneficiaries—such as petitioner—could in turn create a conflict of interest on the part of trustees. *See NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 329 (1981) ("a trustee bears an unwavering duty of complete loyalty to the beneficiary of [a] trust, *to the exclusion of the interests of all other parties*") (emphasis added). In addition, limiting the franchise to those with a beneficial interest in the trusts squares with the principles established by *Salyer Land Co.* v. *Tulare Lake*

[6] There are numerous other examples that belie petitioner's "judicial abdication" argument. *See, e.g., Suitum* v. *Tahoe Reg'l Planning Agency*, 520 U.S. 725, 744 (1997) (because petitioner "does not challenge the validity of the agency's regulations" "her litigating position assumes that the agency may validly bar her land development just as all agree it has actually done, and her only challenge to the TDRs raises a question about their value, not about the lawfulness of issuing them"); *Bell* v. *New Jersey*, 461 U.S. 773, 791 (1983) ("New Jersey has not challenged the [statutory] program itself as intruding unduly on its sovereignty, but challenges only the requirement that it account for funds that it accepted under admittedly valid conditions with which it failed to comply. If the conditions were valid, the State had no sovereign right to retain funds without complying with those conditions") (citations omitted); *L.P. Steuart & Bro., Inc.* v. *Bowles*, 322 U.S. 398, 403, 407 (1944) (accepting validity of unchallenged statutory program authorizing executive department to issue certain orders, the challenged order was plainly authorized).

Basin Water Storage District, supra. See Pet. App. 17a, 37a-43a; *infra* at 41-45.

This is not to say that a State or Congress may "insulate" from judicial review laws that—if challenged—might warrant further judicial inquiry. Pet. Br. 49 (quotation omitted). Rather, we simply invoke the basic principle of judicial restraint that federal courts—whose grave authority to determine issues of constitutionality derives, after all, from the more mundane duty to decide cases and controversies, *see Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177-178 (1803)—should only question the laws challenged by the parties before them. Such restraint is especially called for when, as here, a federal court considers the constitutionality of a state law.[7]

That this Court has declined to extend a presumption of constitutionality to laws it has determined are race-based does not affect the inquiry in this case. *See* Pet. Br. 46. In the first place, as we explain below, neither the challenged law nor the underlying trust structure discriminates on account of race. But more fundamentally, in the cases cited by petitioner the laws that this Court held were not entitled to a presumption of constitutionality had been *challenged*. We are aware of no case—certainly petitioner has cited none—in which this Court has declined to presume the validity of a law that had not been challenged. Considerations of federalism alone make this case an ill-suited candidate to be the first.

To be sure, this Court has "discretion" to consider the validity of unchallenged provisions. *United States Nat'l Bank of Or.* v. *Independent Ins. Agent of Am., Inc.*, 508 U.S. 439, 447 (1993). But the Court generally declines to take an issue up for the first time itself and, thus, typically refuses to address issues that were not decided below,

[7] The "private will" cases cited by petitioner are readily distinguishable. *See* Br. 46-47. Private wills themselves are not subject to constitutional challenge, and are not entitled to a presumption of constitutionality.

especially when, as here, they also fall outside the question presented. *See, e.g., Cass County, Minn.* v. *Leech Lake Band of Chippewa Indians*, 118 S. Ct. 1904, 1911 n.5 (1998); *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 30 (1981). In *National Bank of Oregon* the Court of Appeals had requested briefing on the unchallenged provision before "resolving the status of th[at] provision." 508 U.S. at 446. Here, the Court of Appeals never decided the constitutionality of the unchallenged trusts or OHA, leaving a blank slate for this Court.

Given these first principles of judicial restraint, the Court should decide this case on the narrow terms on which it reached this Court's steps, and hold that the challenged classification is permissibly based on beneficiary status, not race. In any event, as we explain below, petitioner's challenge also fails on the unrestrained terms in which he and his amici present it to this Court.

II. IN ADMINISTERING THE FEDERAL TRUST RESPONSIBILITY TO INDIGENOUS HAWAIIANS, THE STATE HAS NOT DEFINED THE FRANCHISE ON ACCOUNT OF RACE.

A. The Centuries-Old Understanding Is That Legislation Addressed To America's Once-Sovereign, Indigenous People Is Not Race-Based.

Because Hawaii looks to and draws authority to deal with indigenous Hawaiians from federal law, *see supra* at 6-9, consideration of petitioner's challenge to the voting provision and the underlying trust structure must begin with Congress' "plenary power over Indian affairs." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998). The legitimacy of that power—and two centuries of this Court's decisions validating it—depend on the understanding that classifications singling out "Indians" for special treatment are not race-based within the meaning of the Civil War Amendments. As we explain in Part II.B *infra*, there is no reason to adopt a different regime in the case of indigenous Hawaiians.

The Framers understood that one of the fundamental tenets of nationhood was the ability to deal with the extension of sovereignty over lands occupied by aboriginal groups, whom they called "Indians" or "tribes." Thus, "[f]rom almost the beginning the existence of federal power to regulate and protect the Indians and their property * * * has been recognized." *Board of Comm'rs of Creek County* v. *Seber*, 318 U.S. 705, 715 (1943) (citing *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832)). While not absolute, the Court has characterized this power as "plenary," and recognized that under our system of separated powers it lies within the province of Congress. *E.g., Alaska* v. *Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 531 n.6 (1998); *Yankton Sioux Tribe*, 522 U.S. at 343; *see also United States* v. *McGowan*, 302 U.S. 535, 539 (1938) ("Congress possesses the broad power of legislating for the protection of the Indians *wherever they may be* within the territory of the United States.") (quotation omitted; emphasis added).

"The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself." *Morton* v. *Mancari*, 417 U.S. at 551-552. It derives from the Indian Commerce Clause (Art. I, § 8, cl. 3), *e.g., Native Village of Venetie*, 522 U.S. at 531 n.6; Treaty Clause (Art. II, § 2, cl. 2), *e.g., McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 172 n.7 (1973); Property Clause (Art. IV, § 3, cl. 2), *e.g., United States* v. *Kagama*, 118 U.S. 375, 379-380 (1886); and Debt Clause (Art. I, § 8, cl. 1), *e.g., United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 397 (1980). Given the centuries-worth of judicial and legislative precedent in this area, this Court has recognized that Congress' broad authority over Indian affairs "cannot be doubted." *Seber*, 318 U.S. at 715.

Congress has exercised this authority on countless occasions, crafting whole eras of Indian policy and legislating scores of rights, privileges, and burdens for the Na-

tion's first sovereigns and their descendants—including American Indians in the lower 48 States, Alaska Natives, *and* Hawaiians. Indeed, "[f]rom the commencement of our government, Congress has passed acts to regulate trade and intercourse with the Indians." *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) at 556. Today an entitre title of the United States Code (Title 25) is devoted to "Indians," and Natives from across the land—including from Hawaii—are singled out for special treatment in virtually every other title of the Code.

This authority extends to voting matters. The Menominee Restoration Act of 1973, 25 U.S.C. § 903b, for example, established federally supervised elections in which all Menominees—members of a community whose tribal status had been terminated—with "at least one-quarter degree of Menominee Indian blood," and their "descendants," were entitled to vote on a self-governance matter. Likewise, the Alaska Native Claims Settlement Act of 1971 ("ANCSA"), 43 U.S.C. § 1601, provides for the establishment of Native-run state corporations, and explicitly limits voting rights on certain matters to "Native" shareholders and their "descendant[s]," without regard to tribal status. *Id.* § 1606(h)(2)(C); *see id.* § 1606(h)(3)(D); *Broad* v. *Sealaska Corp.*, 85 F.3d 422, 429-430 (9th Cir. 1996) (discussing ANCSA voting rights). In addition, the Indian Reorganization Act ("IRA") expressly limits voting rights to tribal Indians forming IRA governments. 25 U.S.C. § 476. *See also, e.g., id.* § 504 (limiting voting rights in "local cooperative associations" to "Indians" residing within the prescribed district). Native elections are front page news in many Western States, but only Natives are allowed to vote.

These laws are a product of the special relationship that the United States has assumed with Native Americans. Chief Justice Marshall recognized this relationship in *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831), when he analogized the relationship between American Indians and the United States to that of a "ward

to his guardian." In subsequent cases, the Court has acknowledged that this relationship stems in part from the fact that, in expanding westward with the frontier, the Federal Government "took possession of [Indians'] lands, sometimes by force, leaving them * * * needing protection." *Seber*, 318 U.S. at 715. *See County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 253 (1985); *Seminole Nation* v. *United States*, 316 U.S. 286, 296-297 (1942). *See also Morton* v. *Ruiz*, 415 U.S. 199, 236 (1974) ("The overriding duty of our Federal Government to deal fairly with Indians wherever located has been recognized by this Court on many occasions.").

"It is for [Congress], and not for the courts," to determine when the United States should assume such a relationship with an indigenous people, and to decide "when the true interests of the Indian require his release from such condition of tutelage." *United States* v. *Candelaria*, 271 U.S. 432, 439 (1926) (quotation omitted). *Accord United States* v. *Chavez*, 290 U.S. 357, 363 (1933); *United States* v. *Nice*, 241 U.S. 591, 597 (1916). Likewise, the Constitution gives Congress—not the courts—authority to acknowledge and extinguish claims based on aboriginal status. "The American people have compassion for the descendants of those Indians who were deprived of their homes and hunting grounds by the drive of civilization," and Congress may address the consequences of our Nation's expansion "as a matter of grace, not because of legal liability." *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, 281-282 (1955).

Justice Jackson put it this way: "The generation of Indians who suffered the privations, indignities, and brutalities of the westward march of the whites have gone to the Happy Hunting Ground, and nothing that we can do can square the account with them. Whatever survives is a moral obligation resting on the descendants of the whites to do for the descendants of the Indians what in the conditions of this twentieth century is the decent thing."

Northwestern Bands of Shoshone Indians v. *United States*, 324 U.S. 335, 355 (1945) (Jackson, J., concurring). Even when there is "no legal obligation[]" to redress such wrongs, Congress may make such amends as "its judgment dictates." *Id.* at 358. *See Blackfeather* v. *United States*, 190 U.S. 368, 373 (1903) ("The moral obligations of the government toward the Indians, whatever they may be, are for Congress alone to recognize").

Congress and this Court have often referred to indigenous people—especially Indians and tribes—in terms of race. Indeed, this Court interpreted one of Congress' earliest uses of the word "tribe" to be based in part on a group's "race." *See United States* v. *Candelaria*, 271 U.S. at 442 ("Indian tribe" in Nonintercourse Act refers to "a body of Indians of the same or a similar race"); *Montoya* v. *United States*, 180 U.S. 261, 266 (1901) (same); *United States* v. *Rogers*, 45 U.S. (4 How.) 567, 573 (1846) (use of "tribe" "does not speak of members of a tribe, but of the race generally—of the family of Indians"). Yet until recently, it has never been suggested that Indian legislation is race-based within the meaning of the Civil War Amendments. If it were, Congress' plenary authority over Indian affairs would have been severely circumscribed by those Amendments.[8]

In fact, this Court has held that "federal regulation of Indian affairs is *not* based upon impermissible classifications." *United States* v. *Antelope*, 430 U.S. 641, 646

[8] Indeed, many of this Court's decisions—including recent ones like *Native Village of Venetie*, 522 U.S. at 534 ("Whether the concept of Indian country should be modified is a question *entirely* for Congress.") (emphasis added)—emphasize the breadth of Congress' authority over Indian affairs. There could scarcely be a greater upheaval in the separation of powers than to go from treating a matter as essentially within Congress' exclusive domain to subjecting it to the strictest possible judicial review, as petitioner and his amici urge the Court to do here.

(1977). *See id.* at 645 ("The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications."). Instead, such regulation is based on the unique legal and political status of indigenous groups that enjoy a congressionally recognized, trust relationship with the United States. That is the basis for this Court's unanimous decision in *Morton* v. *Mancari*, *supra*.

In *Mancari* non-Indians challenged an employment preference for Indians on the ground that it discriminated "on the basis of race." 417 U.S. at 540. This Court disagreed, grounding its decision on "[t]he plenary power of Congress to deal with the special problems of Indians" and "the assumption of a 'guardian-ward' status." *Id.* at 551-552. As the Court noted, Congress has directed innumerable laws to Native Americans; "[i]f these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized." *Id.* at 552. Viewed in this "historical and legal context," the challenged preference was based on the "unique legal" and "political" status of American Indians, not race. *Id.* at 551, 553-554 & n.24.

The Court has embraced the *Mancari* rationale for reviewing "legislation that singles out Indians for particular and special treatment" in numerous cases. *Id.* at 554-555.[9] Applying it, the Court "has never overturned a statute or treaty affecting Indians or natives." *Williams*

[9] *See, e.g., Duro* v. *Reina*, 495 U.S. 676, 692 (1990) (citing *Mancari*); *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 673 n.20 (1979) (quoting *Mancari*); *Washington* v. *Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 500-501 (1979) (same).

v. *Babbitt*, 115 F.3d 657, 663 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1795 (1998). At the same time, the Court has repeatedly found "the argument that [Indian] classifications are 'suspect'" to be "untenable." *Washington* v. *Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. at 501.

The conclusion that laws singling out indigenous groups are not race-based within the meaning of the Civil War Amendments surely would come as no surprise to the Reconstruction Congress. Between 1866 and 1875, Congress singled out Natives for special treatment in scores of statutes and treaties. *See* Felix S. Cohen, *Handbook of Federal Indian Law* 840-841 (1982) (listing some of these provisions). In addition, the Fourteenth Amendment itself acknowledges that Indians may continue to be singled out, excluding "Indians not taxed" for apportionment purposes. U.S. Const. amend. XIV, § 2. All this confirms the obvious: Americans did not take up arms against one another to limit Congress' authority to deal with American Indians, or Natives from more far flung places like Alaska or Hawaii.

Faced with the weight of history and this Court's precedents, petitioner and his amici are forced to suggest that this regime has been (or should be) "overruled" by the Court's recent "equal protection jurisprudence, particularly [*Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200 (1995)]." Br. 42 n.17; *see id.* 39 n.15. But neither *Adarand* nor *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989)—cases having nothing to do with Indian affairs—repudiates the principles discussed above. There is no reason to conclude that *Adarand* (or any other case) "meant to overrule, *sub silentio*, two centuries of jurisprudence," *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 98 (1998), and all but strip Congress of its plenary authority over Indian affairs.

B. There Is No Legal, Historical, Or Honorable Reason To Treat Indigenous Hawaiians Any Differently Under The Settled Regime.

Short of toppling this time-honored regime, petitioner's claim that the challenged law is race-based depends on the conclusion that this framework does not apply to indigenous Hawaiians. Petitioner would thus have this Court relegate Hawaiians to second-class status among the Nation's indigenous people.

1. Petitioner argues that a "special relationship" does not exist between indigenous Hawaiians and the United States, citing judicial decisions, executive materials, and secondary sources. *See* Br. 39-45. He neglects to mention, however, that *Congress* has expressly recognized such a relationship. *See* 20 U.S.C. § 7902(13) ("special relationship * * * exists between the United States and the Native Hawaiian people"); *id.* § 7902(8), (10), (12), (13), (14) (same); 42 U.S.C. § 11701(12) ("trust relationship"); *id.* § 11701(13), (14), (15), (16), (18), (19), (21) (same). Charged with meaning of which Congress is presumed to be aware, *see Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 184-185 (1988), these are not phrases that Congress lightly weaves into federal law. Congress has repeatedly affirmed this "unique legal relationship * * * through the enactment of Federal laws which extend to the Hawaiian people the same rights and privileges accorded to American Indian, Alaska Native, Eskimo, and Aleut communities." 42 U.S.C § 11701(19); *accord* 20 U.S.C. § 7902(13).

Perhaps petitioner is aware of these laws, because he also suggests that Congress lacks the authority to enter into such a relationship with Hawaiians, and to fulfill it in the same fashion Congress has done with respect to America's other indigenous people. *See* Br. 42-43. Here, too, petitioner is at odds with existing law. Congress

has expressly found that "[its] authority * * * under the United States Constitution to legislate in matters affecting the aboriginal or indigenous people of the United States includes the authority to legislate in matters affecting the native peoples of Alaska *and Hawaii*." 42 U.S.C. § 11701(17) (emphasis added). There is no reason for this Court to part with Congress here; Congress' broad authority over Indian affairs reaches the shores of Hawaii, too.

As discussed, Congress derives its power over Indian affairs from several constitutional fonts. Petitioner's principal argument is that this authority is limited by the words "Indian tribes" in the Indian Commerce Clause (Art. I, § 8, cl. 3). *See* Pet. Br. 39-40. As a textual —not to mention historical and common sense—matter, that argument should be rejected. In empowering Congress with the authority to single out and deal with indigenous societies they knew as "Indians" or "tribes," the Framers did not intend to restrict Congress' authority to deal with the extension of sovereignty over indigenous groups of which they may never have heard, but which would pose the same basic issues as Indians occupying the 1789 frontier.

The words "Indian" and "tribes" do not place Congress in this bind. In colonial America, "Indian" was still defined as "[a] native of India." Thomas Sheridan, *A Complete Dictionary of the English Language* (2d ed. 1789). That is whom Columbus thought he came upon when he discovered America. The Framers—and generations before them—of course knew that Columbus had not reached India, but they used "Indian" to refer to "the inhabitants of our Frontiers." Declaration of Independence para. 29 (1776). *See also* Thomas Jefferson, *Notes on the State of Virginia* 100 (William Peden ed. 1955) (1789) (referring to Indians as "aboriginal inhabitants of America"); Roger Williams, *A Key Into the Language*

of America 84 (1643) (aboriginals were "Natives, Savages, Indians, Wild-men," etc.); *The First Three English Books on America* 242 (Edward Arber ed. 1835) (" 'Indians' " were " 'all nations of the new founde lands.' ") (quoting Gonzalo Fernandez de Oviedo y Valdez, *De la Natural Hystoria de las Indias* (1526)). It is not surprising, then, that Captain Cook and his crew called the Islanders who greeted their ships in 1778 "Indians." 1 Kuykendall, *supra*, at 14 (quoting officer journal).

The word "tribe" is of no avail to petitioner either. At the founding, "tribe" meant "[a] distinct body of people as divided by family or fortune, or any other characteristic." Thomas Sheridan, *A Complete Dictionary of the English Language* (2d ed. 1789). *See* II Samuel Johnson, *A Dictionary of the English Language* (6th ed. 1785) (same); John Walker, *A Critical Pronouncing Dictionary and Expositor of the English Language* (1791) (same); William Perry, *The Royal Standard English Dictionary* 515 (1788) (defining "tribe" as "a certain generation of people").[10] That is—perhaps not coincidentally —how Congress has described Hawaiians, and fittingly so. *See* 42 U.S.C. § 11701(1) (Hawaiians are "a distinct and unique indigenous people with a historical continuity to the original inhabitants of the Hawaiian archipelago"); 20 U.S.C. § 7902(1) (same). That "tribe" may mean something else today—in either legal or lay terms—should not circumscribe the authority conferred upon Congress to deal with indigenous people by those who ratified the Constitution in 1789.

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[10] This is consistent with how Chief Justice Marshall referred to Indian tribes in *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) at 559-560. He analogized them to "nations" and explained that "[t]he very term 'nation,' so generally applied to [Indian tribes], means 'a people distinct from others.' " *Id.* at 561. Hawaiians were not only a "Nation" in 1778, but were and remain a "distinct and unique indigenous people." 42 U.S.C. § 11701(1).

Congress' authority to deal with indigenous Hawaiians finds support in other provisions of the Constitution as well. This includes the Foreign Commerce Clause (Art. I, § 8, cl. 3), which authorizes Congress to legislate on account of the separate "Nation" that Hawaiians comprised prior to 1778. 42 U.S.C. § 11701(1). Another is the Debt Clause (Art. I, § 8, cl. 1), which confers upon Congress "broad constitutional power * * * to *define* and 'to pay the Debts * * * of the United States,' " including those of a "moral" or "honorary" kind. *United States* v. *Sioux Nation,* 448 U.S. at 397 (quoting Debt Clause) (emphasis added). *See Pope* v. *United States,* 323 U.S. 1, 9 (1944). Congress' recognition of the wrongs inflicted upon Hawaiians, *see* Apology Bill, 107 Stat. at 1513; 42 U.S.C. § 11701(8)-(11), and efforts to redress such wrongs—including by according Hawaiians the same special treatment accorded American Indians—are a constitutional and honorable attempt to do "what in the conditions of this twentieth century is the decent thing." *Northwestern Bands of Shoshone Indians,* 324 U.S. at 355 (Jackson, J., concurring).

2. Petitioner also argues that the *Mancari* rationale does not apply to indigenous Hawaiians because they "are not a federally recognized Indian tribe." Br. 39. *Mancari* is indeed addressed in part to federally recognized tribes; that is how the challenged preference in that case was written. *See* 417 U.S. at 535 n.24 (" 'To be eligible for [the preference] an individual must be one-fourth or more degree Indian blood and be a member of a Federally-recognized tribe.' ") (quoting Bureau of Indian Affairs ("BIA") preference). But as this Court explained in *Mancari,* the understanding that Indian legislation is not race-based rests upon the "*unique legal status* of Indian tribes under federal law and upon the plenary power of Congress, based on * * * the assumption of a 'guardian-ward' status, *to legislate on behalf of* federally recognized Indian tribes." *Id.* at 551 (emphases added); *see id.* at

555. Thus, while he talks about "Indian tribes," petitioner in fact grounds his effort to distinguish *Mancari* on the propositions that—unlike Indian tribes—indigenous Hawaiians do not enjoy a "special relationship" with the United States, and that Congress lacks the authority to treat them accordingly. *See* Br. 39-44.

But, as discussed, Congress is constitutionally empowered to deal with Hawaiians, has recognized such a "special relationship," and—"[i]n recognition of th[at] special relationship"—"has extended to Native Hawaiians the *same* rights and privileges accorded to American Indian, Alaska Native, Eskimo, and Aleut communities." 20 U.S.C. § 7902(13) (emphasis added). As such, Congress has established with Hawaiians the same type of "unique legal relationship" that exists with respect to the Indian tribes who enjoy the "same rights and privileges" accorded Hawaiians under these laws. 42 U.S.C. § 11701(19). That unique legal or political status—not recognition of "tribal" status, under the latest executive transmutation of what that means—is the touchstone for application of *Mancari* when, as here, Congress is constitutionally empowered to treat an indigenous group as such.[11]

This reading of *Mancari* comports with the fact that for most of our history "tribal" status has been an indeterminate concept marshaled by the executive branch, *see* Cohen, *supra,* at 3, and, thus, is a poor proxy for determining whether *Congress* may legislate with respect to a particular indigenous group. It also takes into account that Congress has historically exercised its Indian affairs power

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[11] That Congress granted indigenous Hawaiians citizenship and subjected them to the same laws as other citizens does not alter the unique legal and political status that Hawaiians occupy under federal law. Congress treated Alaska Natives in a similar fashion, *see Metlakatla Indian Community* v. *Egan,* 369 U.S. at 51, and "the extension of citizen status to Indians does not, in itself, end the powers given to Congress to deal with them." *United States* v. *John,* 437 U.S. 634, 653-654 (1978).

over indigenous people not organized into tribes in an anthropological sense, not recognized as tribes under then-prevailing definitions, or whose tribal status had been terminated—and this Court has upheld that exercise of authority. Thus, for most of our history (until 1993), most Alaska Native Villages were not recognized by BIA as "Indian tribes," *see Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 110 n.32 (1949) ("Indian tribes do not exist in Alaska in the same sense as in [the] continental United States.") (quotation omitted); yet this Court has never questioned Congress' authority to single out and deal with Alaska Natives as such. *See, e.g., Native Village of Venetie*, 522 U.S. at 523-524 (discussing ANCSA); *see generally* David S. Case, *Alaska Natives and American Laws* 195-222 (1984) (discussing federal programs for Alaska Natives).

The same goes for Congress' efforts with respect to Pueblos. In *United States* v. *Joseph*, 94 U.S. 614, 617 (1876), the Court held that "pueblo Indians, if, indeed, they can be called Indians," could *not* "be classed with the Indian tribes for whom the intercourse acts were made." In *United States* v. *Sandoval*, 231 U.S. 28 (1913), the Court was confronted with the argument that Congress therefore lacked the authority to deal with Pueblos as Indians or tribes. The *Sandoval* Court recognized that Pueblos were different from other Indians—they were citizens, held title to their lands, and lived in "separate and isolated communities." *Id.* at 39, 47-48. But "[b]e this as it may," Pueblos "have been regarded and treated by the United States as requiring special consideration and protection, like other Indian communities." *Id.* at 39. And—as long as it "cannot be said to be arbitrary"—Congress' assertion of such a "guardianship" "must be regarded as both authorized and controlling." *Id.* at 47.[12]

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[12] This Court subsequently held that Pueblos are "plainly within [the] spirit" and "fairly within [the] words" of a statute addressed to "any tribe of Indians." *United States* v. *Candelaria*, 271 U.S. at 441 (quotation omitted). But *Sandoval* establishes that Congress' rational decision to enter into a special trust relationship with a distinct indigenous people—not merely recognizing or labeling such people a "tribe"—is the touchstone for invoking Congress' broad authority over Indian affairs.

So too here, indigenous Hawaiians may be different in certain respects from other "Indians" or "Indian communities," but Congress has repeatedly singled Hawaiians out for the same type of special treatment accorded other Native Americans—including Indian tribes. Indeed, this case is easier than *Sandoval* in that Congress has not only "regarded and treated [Hawaiians] as requiring special consideration and protection, like other Indian communities," *id.* at 39, but has expressly recognized a special trust relationship with Hawaiians. *See supra* at 27-28. Because the decision to treat Hawaiians as such "cannot be said to be arbitrary," the assertion of such a "guardianship" should "be regarded as both authorized and controlling." *Id.* at 47. This Court has never disturbed such a congressional determination.

Delaware Tribal Business Committee v. *Weeks*, 430 U.S. 73 (1977), and *United States* v. *John*, *supra*, also belie petitioner's crabbed reading of *Mancari*. *Weeks* involved a challenge to a federal law providing for the distribution of certain funds to Delaware Indians and their descendants. Applying *Mancari*, the Court held that although one of the groups of Indian-descendant beneficiaries was "not a recognized tribal entity, but * * * simply individual Indians with no vested rights in any tribal property," Congress' extension of benefits to those individuals was nevertheless authorized by its "unique obligation toward the Indians." 430 U.S. at 85 (quotation omitted); *see id.* at 86.

Similarly, in *John* the Court affirmed Congress' power to subject Indians remaining in Mississippi to different criminal laws—even if they did not belong to tribes.

"Neither the fact that [the Indians] are merely a remnant of a larger group of Indians, long ago removed from Mississippi, nor the fact that federal supervision over them has not been continuous, destroys the federal power to deal with them." 437 U.S. at 653. Nor did the fact that the Executive had previously taken the position that the Indians could not "be regarded as a tribe." *Id.* at 650 n.20. *See also United States* v. *McGowan*, 302 U.S. at 537 (Congress' authority to single out Indians for special treatment extends to "colony" established for Indians previously "scattered" about Nevada lacking any independent tribal status).

To the extent petitioner seeks to link tribal status with the right to self-governance under BIA rules (*see* Br. 40-41), his effort to dodge *Mancari* should also be rejected. Congress has recognized that the United States was complicit in "the deprivation of the rights of Native Hawaiians to self-determination." 107 Stat. at 1513. There is no reason for this Court to compound that injury by holding that one of its consequences is that Hawaiians cannot benefit from the special relationship extended to all other indigenous people. That is especially true given that one of the very purposes of OHA—and the challenged voting provision—is to afford Hawaiians a measure of self-governance. *See supra* at 9-10.[13]

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[13] It is Congress' recognition of a special relationship with an indigenous people—not any particulars of tribal status—that controls. As noted, Congress may terminate a group's tribal status when it sees fit, *see supra* at 23, and when it does so, it may sever the special relationship with that people entirely or it may do so "gradually," eliminating some but not all attributes of the special relationship. *Chippewa Indians of Minnesota* v. *United States*, 307 U.S. 1, 4 (1939). Thus, Congress may deal with "Indians upon a tribal basis," even after their "tribal relation[s] ha[ve] been dissolved," when "Congress d[oes] not intend to surrender its guardianship over the Indians." *Id.* The *Weeks* case is to the same effect. So too, in a broader sense, is Congress' approach to Alaska Natives. In ANCSA Congress gave Alaska Natives fee ownership over certain aboriginal lands—rather than subjecting such lands to the federal superintendence that denotes "Indian country"—but Congress has continued the federal guardianship over Alaska Natives in other respects. *See Native Village of Venetie*, 522 U.S. at 533-534. In Hawaii Congress has recognized that the once-sovereign Hawaiians were deprived of their right to self-determination, and has decided that they should remain subject to a special relationship with the United States.

The Constitution, in short, gives Congress room to deal with the particular problems posed by the indigenous people of Hawaii and, at least when legislation is in furtherance of the obligation Congress has assumed to those people, that legislation is no more racial in nature than legislation attempting to honor the federal trust responsibility to any other indigenous people. It is, in sum, "not racial at all." *Regents of Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 304 n.42 (1978) (Opinion of Powell, J.) (discussing *Mancari*).

3. In a footnote (Br. 41 n.16), petitioner claims that *Mancari* cannot be applied to the law challenged in this case because it was passed by a State. But the decision on which he relies—*Washington* v. *Confederated Bands & Tribes of Yakima Indian Nation*, *supra*—cuts in favor of, not against, the State in this case. *Yakima* involved a challenge to a State law that extended the State's jurisdiction "over Indians and Indian territory within the State" for certain purposes. 439 U.S. at 465. The Yakima Nation challenged the law on the ground that it violated equal protection. This Court *rejected* the claim. While recognizing that "States do not enjoy th[e] same unique relationship with Indians," the Court made clear that States may act in the realm of Indian affairs pursuant to delegated federal authority. The challenged law in *Yakima* was "not simply another state law"; it "was enacted in response to a federal measure explicitly designed to [deal with a related Indian matter]." *Id.* at 501. Because the state law flowed from the "federal measure," the Court—invoking *Mancari*—found "untenable" the argument that the law drew a " 'suspect' " classification. *Id.*

Similarly, in *Washington* v. *Washington State Commercial Fishing Vessel Ass'n*, 443 U.S. 658 (1979), this Court summarily rejected the argument that state fishing regulations protecting federal treaty rights to the exclusion of non-Indians violated equal protection. "The simplest answer to this argument [was] that this Court has already held that these treaties confer enforceable special benefits on signatory Indian tribes, and has repeatedly held that the peculiar semisovereign and constitutionally recognized status of Indians justifies special treatment on their behalf when rationally related to the Government's 'unique obligation toward the Indians.'" *Id.* at 673 n.20 (quoting *Mancari*; citations omitted). That the challenged regulations were passed by a State did not render the Indian classification racial; rather, because the state law was an extension of the federal trust obligation, it was amenable to the same treatment under *Mancari* as federal law.

In the case of Hawaii, Congress has gone out of its way not only to delegate to the State responsibility to administer the federal trust for indigenous Hawaiians, but to reaffirm the State's efforts to administer that trust. When Congress obligated Hawaii to hold lands in trust for the "betterment" of its indigenous people as a condition of statehood, Congress expressly delegated to Hawaii the authority to administer the federal trust "in such a manner as the constitution and laws of the * * * State may provide." Statehood Act, § 5(f). Hawaii accepted that responsibility and—reaffirming this "solemn trust obligation and responsibility"—established OHA, the unchallenged trusts, and the voting provision at issue. Haw. Rev. Stat. § 10-1(a). This trust structure—right down to the provision giving indigenous Hawaiians the right to select who should run the trusts—flows from the federal delegation, promotes the federal trust relationship, and complements the federal role.

Congress is obviously aware of and has ratified the State's efforts to administer the federal trust. Thus, Congress has expressly recognized that the "constitution and statutes of the State of Hawaii * * * acknowledge the distinct land rights of the Native Hawaiian people as beneficiaries of the public lands trust." 42 U.S.C. § 11701(3); *see* 20 U.S.C. § 7902(21). In addition, Congress has repeatedly recognized and appropriated federal monies to OHA—the "Native Hawaiian organization" that was "established by the constitution of the State of Hawaii," "serves and represents the interests of Native Hawaiians," and "has as a primary and stated purpose the provision of services to Native Hawaiians." 25 U.S.C. § 3001(11), (12). *See supra* at 11. Evidence of the federal approval of Hawaii's efforts to honor its delegated federal trust responsibilities—including through OHA—is abundant, and resolves any *Yakima* issue here.[14]

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[14] Petitioner argues that the State has improperly expanded the federal trust by extending benefits to all indigenous Hawaiians. Since the 1970s, Congress has repeatedly defined Native Hawaiian to include "*any* individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in * * * Hawaii." 16 U.S.C. § 470w(17) (emphasis added); *see* note 4, *supra*. In establishing OHA, the definition of "Hawaiian" was added to bring state law "in line with" this federal definition. J.A. 46 (Comm. Rep. No. 59). And Congress' repeated use of the broader definition thereafter establishes its ratification of the definition used by OHA. *See Bragdon* v. *Abbott*, 118 S. Ct. at 2208.

In any event, this argument is beside the point for present purposes. Petitioner's claim that the challenged classification is unconstitutionally race-based would be no different if the electorate were limited to Native Hawaiians as defined in the HHCA. And petitioner, who is not an indigenous Hawaiian, lacks standing to object that the trusts should be administered to benefit only a subgroup of such Hawaiians. *See, e.g., Whitmore* v. *Arkansas*, 495 U.S. 149, 155 (1990) (to meet Article III standing requirement, plaintiff "must allege an injury to *himself*") (emphasis added); *Diamond* v. *Charles*, 476 U.S. 54, 62 (1986) ("The exercise of judicial power * * * can so profoundly affect the lives, liberty, and property of those to whom it extends, that the decision to seek

Congress has taken a different approach to Native affairs in the lower 48 States, Alaska, and Hawaii, due to the unique circumstances presented by each. The Framers gave Congress—not this Court—the prerogative to decide what policy to pursue in addressing the situation of the indigenous people in each of these geographic and historical categories. *See United States* v. *Hellard*, 322 U.S. 363, 367 (1944) ("Since the power of Congress over Indian affairs is plenary, it may waive or withdraw these duties of guardianship or entrust them to such agency—state or federal—as it chooses."). This Court should respect the role that Congress carved out for the State in dealing with indigenous Hawaiians.

C. Even If Indigenous Hawaiians Could Be Singled Out For "Second-Class" Treatment Under The Settled Regime, The Challenged Law Is Based On Time And Place, Not Race.

Even if the challenged law were not analyzed like every other classification addressed to an indigenous people subject to a congressionally recognized trust relationship with the United States, it would still not be suspect because it is drawn in terms of time and place—not race.

The plain language of the Hawaii statute makes clear that the term "Hawaiian" is not used in any racial sense. It covers "any" descendant of the aboriginal people of a particular place and time—the Hawaiian Islands prior to 1778—of *whatever* race. Haw. Rev. Stat. § 10-2. Nothing about the classification makes race a necessary, sufficient, or even pertinent factor. And, as a logical and practical matter, it is not. According to petitioner, Hawaii "was not 'racially pure' even before 1778." Br. 25 n.9.[15]

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review must be placed in the hands of those who have a direct stake in the outcome.") (quotations and citations omitted).

[15] Based on archeological and linguistic clues, some scholars have theorized that in 1778 Hawaiians comprised different ethnic if not racial groups, derived from successive migratory waves. *See* Patrick Kirch, *Feathered Gods and Fishhooks* 64-66, 259 (1985) (concluding that different groups of Marquesans and Tahitians migrated to Hawaii); *cf.* Peter Bellwood, *Man's Conquest of the Pacific* 325, 354 (1979) (discussing migration from Marquesan Islands); 1 Kuykendall, *supra*, at 3 (Tahiti); Heyerdahl, *supra*, at 161-168 (Pacific Northwest).

Polynesians who did not inhabit the Islands in 1778 but are probably of the same "racial" group as most if not all Islanders in 1778—*e.g.*, Tongans, Samoans, Tahitians, and Maoris—are excluded from the classification. And "Hawaiians" covered by the classification today could be characterized in terms of many different races.

In this regard, this case is not at all like the "grandfather clause" cases relied upon by petitioner (Br. 15-16), or the demagogic analogies drawn by petitioner to the "miscegenation" and "Nuremberg" laws (*id.* 24 n.8, 28 n.11). Simply reading the statute shows that the classification is not expressly racial, and the subterfuge cases do not apply because the restriction is in no sense a proxy for race. The statute reflects on its face the classification sought to be drawn—it gives the franchise to the indigenous people of Hawaii, of whatever race. There is nothing circuitous about that.[16]

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[16] Even if all those who met the statutory definition *were* of the same race, it would not mean that the classification is itself racial, or a subterfuge for a racial classification. *Mancari* makes that clear, insofar as it recognizes that legislation addressed to "racial" groups of indigenous people is not race-based. 417 U.S. at 553 n.24. *See also, e.g., Personnel Adm'r of Mass.* v. *Feeney*, 442 U.S. 256 (1979); *Hernandez* v. *New York*, 500 U.S. 352, 375 (1991) (O'Connor, J., concurring in judgment) ("No matter how closely tied or significantly correlated to race the explanation for [a governmental action] may be, the [action] does not implicate the Equal Protection Clause *unless it is based on race.*") (emphasis added). In addition, this Court has repeatedly held that a "racially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment violation." *City of Mobile* v. *Bolden*, 446 U.S. 55, 62 (1980). The challenged classification here was not motivated by any "racially discriminatory" design.

Petitioner makes much of the challenged classification's reliance on the year 1778, in accordance with the congressional definition of indigenous Hawaiians. *See* note 4, *supra*. That date was chosen to fix the aboriginal and indigenous *status* of the covered people, not—as petitioner surmises—to ensure "racial purity." Br. 25. Regardless of their race, the people who inhabited the Islands in 1778 not only have the strongest but the *only* truly aboriginal claim to the Islands.

The arrival of Westerners in 1778 transformed the aboriginal Hawaiian society prior to the *coup d'état* of 1893 and the annexation of the Islands to the United States in 1898. So too, the arrival of the Dutch, English, and French transformed aboriginal societies in eastern North America prior to the formation of the United States; the arrival of the Spanish and French transformed aboriginal societies along the Mississippi, in Florida, and throughout the southwest prior to the extension of American sovereignty over those areas with the Louisiana Purchase, the Transcontinental Treaty, and the Treaty of Guadelupe Hidalgo; and the arrival of the Russians transformed aboriginal societies in Alaska prior to Seward's purchase in 1867. Nothing about these pre-United States contacts has ever been thought to preclude Congress from recognizing the indigenous people of each of these areas as such, to the exclusion of non-indigenous, pre-United States arrivals to these same lands. There is no reason to treat the Hawaiian episode of basically the same story of conquest any differently.

III. THE FIFTEENTH AMENDMENT DOES NOT GUARANTEE PETITIONER A SAY IN WHO SHOULD ADMINISTER THE UNCHALLENGED TRUSTS.

Petitioner's Fifteenth Amendment claim fails for another reason. As the Court of Appeals put it, the selection of OHA trustees "isn't a general election for government officials performing government functions of the sort that has previously triggered Fifteenth Amendment analysis." Pet. App. 15a. Citing *Terry* v. *Adams*, 345 U.S. 461 (1953), petitioner insists that the Fifteenth Amendment applies to OHA elections. Br. 19. But *Terry* itself makes clear that the Amendment only covers "election[s] in which public issues are decided or public officials selected." 345 U.S. at 468. OHA elections do not decide "public issues," and OHA trustees are not "public officials" in any traditional sense.

Public officials owe a fiduciary duty to the general public. *See, e.g., United States* v. *Lopez-Lukis*, 102 F.3d 1164, 1169 (11th Cir. 1997) ("Elected officials generally owe a fiduciary duty to the electorate."). OHA trustees, by contrast, are statutorily obligated to "act as a trustee as provided by law" for a limited class of beneficiaries—Hawaiians. Haw. Rev. Stat. § 10-5(5). Under settled law, a trustee "bears an unwavering duty of complete loyalty to the beneficiary of [a] trust, to the exclusion of the interests of all other parties." *Amax Coal*, 453 U.S. at 329. *See Ahuna* v. *Department of Hawaiian Home Lands*, 640 P.2d at 1169 ("One specific trust duty is the obligation to administer the trust *solely* in the interest of the beneficiary") (emphasis added). The State recognized this duty in deciding to limit the franchise to beneficiaries. *See supra* at 9-10.

The conclusion that the Fifteenth Amendment does not cover this—or every—election squares with the Amendment's text. By its terms, the Fifteenth Amendment ap-

plies only where the "right * * * to vote" has been infringed on account of a specified factor. U.S. Const. amend. XV, § 1. "The Fifteenth Amendment does not confer the right of suffrage upon any one." *United States* v. *Reese*, 92 U.S. 214, 217 (1875). This Court has recognized that voting is a fundamental right protected by the Fourteenth Amendment. *See Reynolds* v. *Sims*, 377 U.S. 533, 562 (1964). Yet the Court has held that citizens may be excluded under the Fourteenth Amendment from special purpose elections in which they do not have a direct interest. As the courts below recognized, OHA elections bear all the hallmarks of the type of election that this Court has held need not be open to all. There is no reason for this Court to hold here that the "right to vote" is any broader under the Fifteenth Amendment than the Fourteenth.

In a line of cases beginning with *Salyer Land Co.* v. *Tulare Lake Basin Water Storage District, supra*, this Court has held that the Fourteenth Amendment permits States and local governments to limit the franchise in elections for special or limited purposes units of government lacking general governmental powers, whose activities disproportionately affect those entitled to vote. *See Salyer*, 410 U.S. at 728; *Associated Enters., Inc.* v. *Toltec Watershed Improvement Dist.*, 410 U.S. 743, 744 (1973); *Ball* v. *James*, 451 U.S. 355, 370 (1981). OHA elections fall squarely in this category.

OHA does not exercise general governmental powers. Pet. App. 11a-12a, 42a-43a. It is a quasi-independent, "self-governing corporate body." *Trustees of Office of Hawaiian Affairs* v. *Yamasaki*, 737 P.2d 446, 452 (Haw.), *cert. denied*, 484 U.S. 898 (1987); *see* Haw. Rev. Stat. § 10-4. It does not provide services to the general public. Rather, its sole purpose—indeed, its *raison d'être*—is to benefit "Hawaiians," *see* Haw. Const. art. XII, § 6; Haw. Rev. Stat. §§ 10-1(a), 10-3, the people

in whose sole interest OHA trustees are duty bound to act. Its statutory duties and powers are tailored to that special mission. *See supra* at 9-10; Haw. Rev. Stat. §§ 10-4, 10-5, 10-6.

In *Salyer* this Court concluded that a district—"although vested with some typical governmental powers"—did not exercise " 'normal governmental authority' " where it did not provide "general public services such as schools, housing, transportation, utilities, [or] roads." 410 U.S. at 728-729. Similarly, in *Ball* the Court held that a district did not exercise general governmental powers where it could not "impose ad valorem property or sales taxes," "enact any laws governing the conduct of citizens," or "administer such normal functions of government such as the maintenance of streets, the operation of schools, or sanitation, health or welfare services." 451 U.S. at 366. The same goes for OHA, which does not exercise any such powers either.[17]

Indeed, OHA cannot even exercise governmental powers that the special purpose entities in *Salyer* and *Ball* possessed. The district in *Salyer* could condemn private property, *see* 410 U.S. 728 n.7, and the district in *Ball* not only possessed that power but the power to levy certain property taxes as well. *See* 451 U.S. at 360 & 366

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[17] Petitioner contends that OHA provides "extensive" services and therefore exercises the sorts of governmental powers that require statewide elections. Br. 21-22. This is wrong both factually and legally. OHA "generally does not provide direct services but supports groups and agencies that do." J.A. 30 (OHA home page). To the extent OHA provides any services directly to beneficiaries, they merely supplement the far more extensive services provided by the State and local governments to the general public. *See, e.g., Kessler* v. *Grand Cent. Dist. Management Ass'n*, 158 F.3d 92, 105 (2d Cir. 1998) (district did not exercise general governmental powers where its provision of sanitation, security, and social services supplemented the city's more extensive provision of such services). In this respect, OHA functions more like a private charitable organization than a public agency. *See id.*

n.11; *see also Toltec*, 410 U.S. at 744 (district possessed power to levy property taxes). Although such powers are "typical governmental powers," *Salyer*, 410 U.S. at 728, the Court nevertheless concluded in both cases that the districts did *not* exercise general governmental powers triggering the Fourteenth Amendment. OHA—by contrast—cannot exercise *any* of these powers. Moreover, quite unlike the districts in *Salyer* and *Ball*, it is impressed with a trust duty to act solely on behalf of a narrow class of beneficiaries.

OHA activities also plainly have a disproportionate effect on those entitled to select trustees—Hawaiians. Its principal function is to administer the trusts of which Hawaiians are the sole beneficiaries. All funds disbursed by OHA are spent for the benefit of Hawaiians. To the extent OHA directly provides social services, they are rendered exclusively to Hawaiians. OHA does not provide *any* services to the general public. All the trustees' statutory duties and fiduciary responsibilities run exclusively to Hawaiians, and every power granted to OHA reflects the narrow purpose for which the office was created.

In *Salyer* and *Ball*, this Court held that the activities of the districts at issue disproportionately affected landowners—the only persons entitled to vote in those cases—even though in each case the Court acknowledged that nonlandowners were affected in some measure by the districts' operations. *See Salyer*, 410 U.S. at 730-732; *Ball*, 451 U.S. at 368-371. This case is even easier than *Salyer* and *Ball* because non-Hawaiians have virtually no interest in OHA's activities.

Petitioner makes much of the fact that OHA receives some general tax revenues and that it administers certain proceeds from the § 5(f) trust, arguing that as a result non-Hawaiians have an interest in OHA's management of those funds. Br. 20-21. But as this Court emphasized in *Ball*, "[t]he *Salyer* opinion did not say that the selected

class of voters for a special public entity must be the *only* parties at all affected by the operations of the entity. Rather, the question was whether the effect of the entity's operations on them was *disproportionately* greater than the effect on those seeking the vote." 451 U.S. at 371 (emphasis added). That is clearly the case here.

Moreover, the decision to appropriate funds from general tax revenues and the § 5(f) trust is not made by OHA; it is made by the state legislature in which non-Hawaiians (including petitioner) are directly represented. *See* Haw. Rev. Stat. §§ 10-13.3, -13.5. In addition, all state residents—indigenous or not—had a say in creating OHA in the first place. *See Ball*, 451 U.S. at 371 n.20 (appellees were "qualified voters * * * and so remain[ed] equal participants in the election of the state legislators who created and [had] the power to change the District"); *Toltec*, 410 U.S. at 744.

None of this is to say that the State's ability to limit the franchise in OHA elections means that the State may exclude petitioner or anyone else on the basis of race or other suspect characteristic. But it does change the nature of petitioner's claim. Only those classifications that deny a constitutional "right to vote," or otherwise restrict access to an election meeting the *Terry* test, trigger the Fifteenth Amendment. Other classifications remain subject to equal protection review,[18] but, as we explain next, the challenged classification here survives such review.

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[18] *Quinn* v. *Millsap*, 491 U.S. 95 (1989), relied on by petitioner (Br. 20), is in accord. There, the Court overturned a state court decision holding that an election within the *Salyer* exception was not subject to equal protection analysis. In doing so, the Court did not suggest—as petitioner would have it—that the *Salyer* exception cannot apply to race-based voting restrictions, but merely observed that "[t]he rationale of the Missouri Supreme Court's contrary decision would render the Equal Protection Clause inapplicable even to a requirement that all members of the board be

IV. NO MATTER WHAT SCRUTINY IS APPLIED, THE CHALLENGED CLASSIFICATION PASSES CONSTITUTIONAL MUSTER.

The challenged classification passes muster regardless of what scrutiny is applied. In reviewing classifications—including those drawn by state law, *see supra* at 35-38—based on a group's congressionally recognized trust relationship with the United States, this Court looks to whether the provision is "tied rationally to the fulfillment of Congress' unique obligation toward Indians." *Mancari*, 417 U.S. at 555. That inquiry is different from ordinary rationality review, which requires the courts to uphold a law "if there is *any* reasonably conceivable state of facts that could provide a rational basis for the classification." *Heller* v. *Doe*, 509 U.S. 312, 320 (1993) (quotation omitted; emphasis added). The challenged voting provision in this case easily meets the *Mancari* threshold, and neither petitioner nor his amici seriously contend otherwise.

It is undisputed that OHA and the unchallenged trusts were established to further the federal trust obligation to Hawaiians, which Congress has recognized and delegated authority to the State to administer. *See* J.A. 19 (OHA was created in "recognition of Hawaiians as the natives of these islands, entitled to the special legal and political considerations given indigenous people") (OHA home page). OHA exists to promote this special relationship, and the challenged voting provision is designed to "mak[e] [OHA] more responsive to the needs of its constituents" by ensuring "participation by the governed in the governing agency," and thus "further the cause of Hawaiian self-government." J.A. 54 (Comm. Rep. No. 13). The challenged employment preference in *Mancari* advanced the

white males." *Id.* at 106. Thus, *Quinn* simply holds that any voting restriction—like any other governmental classification—remains subject to equal protection review.

same interest. *See* 417 U.S. at 554 (provision "ma[de] the BIA more responsive to the needs of the constituent groups," and ensured "participation by the governed in the governing agency"); *id.* at 542. The provision here also ensures proper administration of the assets held and managed on behalf of Hawaiians.[19]

That should be the end of the matter. But even if the challenged classification were subject to strict scrutiny, it would still survive. Petitioner and his amici argue that the classification singling out indigenous Hawaiians could not possibly meet such scrutiny, relying principally on this Court's affirmative action precedents. *See* Pet. Br. 29-30. None of those cases, however, involved laws singling out an indigenous people subject to a congressionally recognized trust relationship. Neither this Court nor any other has ever applied strict scrutiny to such a classification. In any event, as this Court observed in the affirmative action case on which petitioner most heavily relies, "strict scrutiny is strict in theory, but not fatal in fact." *Adarand*, 515 U.S. at 237 (quotation omitted). It is not fatal here.

As the Court of Appeals held below, "the scheme for electing trustees ultimately responds to the state's compelling responsibility to honor the trust [relationship], and the restriction on voter eligibility is precisely tailored to the perceived value that a board 'chosen from among

[19] Although petitioner suggests (Br. 45) that *Mancari* cannot be applied to "voting laws," nothing in *Mancari* or its progeny supports this result-oriented conclusion. Application of *Mancari* does not depend on the type of law challenged, but rather whether the law is "tied rationally to the fulfillment of Congress' unique obligation toward Indians." 417 U.S. at 555. As a matter of self-governance, not to mention strengthening the fiduciary duty to an indigenous people, Congress may—and has—passed laws limiting the franchise based on indigenous status. *See supra* at 22. Indeed, under petitioner's view, every Native or tribal election would have to be opened to all, a proposition that would radically alter the existing governance of Native affairs.

those who are interested parties would be the best way to insure proper management and adherence to the needed fiduciary principles.'" Pet. App. 17a (quoting Comm. Report No. 59). Moreover, "[g]iven the fact that only [indigenous Hawaiians] are trust beneficiaries, there is no race-neutral way to accord only those who have a legal interest in management of trust assets a say in electing trustees except to do so according to the statutory definition * * * which makes the beneficiaries the same as the voters." *Id.* at 18a.

Petitioner argues that "[t]his Court has never held that [furthering a] legislatively declared 'trust' relationship suffices" as a compelling state interest. Br. 31. But the Court simply has never considered the issue. One need only review the seminal Indian law decisions discussed in Part II.A, *supra*—including *Worcester*—to appreciate the gravity of this interest to a Nation that strives to be "Great." *FPC* v. *Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting). *See also Williams*, 115 F.3d at 665 n.8 ("We have little doubt that the government has compelling interests when it comes to dealing with Indians. In fact, *Mancari*'s lenient standard may reflect the Court's instinct that *most laws favoring Indians serve compelling interests.*") (emphasis added).

The challenged classification here not only promotes the compelling state interest in honoring the special trust relationship with indigenous Hawaiians, it—along with OHA and the unchallenged trusts—addresses the congressionally recognized wrongs that were inflicted upon those people by the United States. *See* Apology Bill, 107 Stat. at 1511-13. The State's efforts—acting pursuant to delegated federal trust responsibility—to "do for the descendants of [indigenous Hawaiians] what in the conditions of this twentieth century is the decent thing," *Northwestern Bands of Shoshone Indians*, 324 U.S. at 355

(Jackson, J., concurring), provide another compelling state interest.

The challenged classification is narrowly tailored to serve these compelling interests. As discussed, it is drawn perfectly to capture indigenous Hawaiians—the "distinct and indigenous people with a historical continuity to the original inhabitants of the Hawaiian archipelago whose society was organized as a Nation prior to the arrival of the first nonindigenous people in 1778." 42 U.S.C. § 11701(1); *see supra* at 38-40. That is the same classification Congress uses in legislating on behalf of the indigenous people of Hawaii. *See* note 4, *supra*. There is simply no practical way to define the classification differently to capture indigenous Hawaiians.

Moreover, it is difficult to conceive of a better way to ensure that OHA acts in the best interests of the beneficaries of the trust relationship—Hawaiians—than to give Hawaiians the final say in who administers the trusts. Indeed, as the Court of Appeals explained, the challenged classification is "precisely tailored" to ensure "proper management and adherence to the needed fiduciary principles." Pet. App. 17a (quotation omitted). Opening up the election (or the unchallenged trusts) to non-beneficiaries not only would fail to serve the compelling interests in promoting the federal trust relationship with Hawaiians and redressing wrongs inflicted upon Hawaiians, it would create a conflict of interest and possible breach of fiduciary duty on the part of trsutees, who, appropriately so, are duty bound under state law to act in the best interests of Hawaiians.

Accordingly, even if this Court concludes that the challenged classification is race-based, the Constitution does not prevent the State—or, for that matter, the United States—from drawing it in seeking to further the Nation's special obligation to indigenous Hawaiians.

* * * *

Petitioner and his amici ask this Court to subject indigenous Hawaiians to a legal regime that not only is entirely different from the one that has for centuries been used to analyze legislation dealing with America's other indigenous people, but would be entirely foreign to the Framers of the Constitution and the Civil War Amendments. Neither this Court's affirmative action precedents, the "painful lessons taught by the Civil War," Pet. Br. 50, nor the result-oriented distinctions petitioner asks this Court to draw between the indigenous people of Hawaii and the indigenous people of the rest of the United States support this unequal and unjust result. The challenged voting provision is not race-based under the regime that has always been applied to legislation singling out indigenous people subject to a special trust relationship with the United States, and accordingly does not violate either the Fifteenth or Fourteenth Amendments.

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

Respectfully submitted,

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